





SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 770

CO-OPERATIVE TRANSIT COMPANY,

Petitioner.

vs.

WEST PENN ELECTRIC COMPANY, a Corporation, WEST PENN RAILWAYS COMPANY, a Corporation, TRI-STATE IMPROVEMENT COMPANY, a Corporation, et al.

BRIEF OF RESPONDENTS IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI.

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Foreword

This case comes before the Court upon a petition for a writ of certiorari to review the judgment of the Circuit Court of Appeals for the Fourth Circuit. The only question involved at this time, therefore, is whether or not the decision, which the petitioner seeks to have reviewed, is in conflict with any decision or decisions rendered by other Circuit Courts of Appeals on the same matter. (Rule 39, revised Rules of the Supreme Court of the United States. *American Construction Co. v. Jacksonville T. & K. W. R. Co.*, 148 U. S. 372, 37 L. Ed. 486. *Magnum Import Co. v. Coty*, 262 U. S. 159, 67 L. Ed. 922.)

It is submitted, at the outset of this brief, that the decision sought to be reviewed in this proceeding is not in conflict with any decision heretofore rendered by any other Circuit Court of Appeals. The Circuit Court of Appeals for the Fourth Circuit has made no new law whatsoever, in this case, but has merely applied well-established principles of law to the facts involved. The brief of the petitioner, the respondents submit, fails com-

pletely to designate a single point which pertains in any way to the only issue presented for determination at this time, namely, the question of the right of the petitioner to a writ of certiorari. The brief fails to disclose any conflict between the decision complained of and any decision or decisions of other Circuit Courts of Appeals dealing with the same or similar questions. An examination of the brief, and an analysis of the cases cited therein, will disclose that the petitioner is complaining, not of any supposed conflict with other decisions, but of what the petitioner conceives to be a misapplication of well-established principles of law to the facts of the case.

Opinions Below

1. The opinion of the District Court of the United States for the Northern District of West Virginia, written by the Honorable William E. Baker, is reported in 46 Fed. Supp., page 59 (R. 57).

2. The opinion of the Circuit Court of Appeals for the Fourth Circuit, written by the Honorable Armistead M. Dobie, is reported in 132 Fed. 2d., page 720 (R. 66).

Statement of the Case

The respondents believe that the Statement of Facts contained in the petition filed herein, and by reference included in the brief of the petitioner, does not fairly present the true factual situation in an entirely accurate and unbiased manner. For this reason, and for fear that this Court may be lead to believe that a serious fraud and great injustice have been perpetrated against the petitioner, the respondents feel justified in pointing out that the petitioner itself is seeking an unjust enrichment. While it is true that the petitioner attempts to base its claim upon an alleged fraud, the basis of the claim is a fraud which is alleged to have been perpetrated, not against the petitioner, but against the bondholders of the Wheeling Traction Company. The petitioner, however, asks redress and restitution therefore, not for the benefit of the supposed victims of the alleged fraud, but for the benefit of the petitioner itself.

In the Deed from the Special Master, under which the petitioner now claims the property involved in this matter, the petitioner received everything that it bargained for, everything that

it expected to get, everything that it paid for, and everything that was within the contemplation of the petitioner, the Special Master and the Court, at the time that the petitioner's bid was made and accepted. Having thus received an adequate consideration for the price that it paid, the petitioner is now seeking to obtain additional properties, the value of which is far in excess of what the petitioner paid for all of the other properties which the petitioner actually bought. On this point we invite the attention of the Court to the following excerpt from the opinion of the Circuit Court of Appeals (132 Fed. 2d. 724, R. 73) :

"Finally, the equities in this case do not favor the appellant. It seems a fair inference that Co-operative received all that it paid for under the judicial sale."

Petitioner, under a decree entered in a foreclosure proceeding purchased a part of the assets of the Wheeling Traction Company. The property was bid in at public sale, and the petitioner received all of the property upon the basis of which its bid was made. The property was conveyed to the petitioner by a special master's deed, and in 1933 a decree, final in every respect, was entered completely liquidating the Wheeling Traction Company and terminating the foreclosure proceeding.

By its present bill, filed in December of 1941, the petitioner is seeking title to a parcel of real estate. The Wheeling Traction did not hold title to the property in question, and it was not before the court during the foreclosure proceeding. The petitioner, charges, however, that the Wheeling Traction Company was the owner of the equitable interest in the property during the foreclosure proceeding, that the lien of the mortgage attached to that equitable interest under and by virtue of an after-acquired property clause contained in the mortgage, and that the right to the property passed to the petitioner under the decree of sale and special master's deed executed pursuant thereto. The petitioner attempts to establish its claim that Wheeling Traction Company owned the equitable interest in the property by charging that funds of the Wheeling Traction Company were used to purchase and improve the property, and that legal title thereto was taken first in the name of an individual, and then conveyed to Tri-State Improvement Company, for the

purpose of preventing the lien of the mortgage from attaching to the property.

At the time of the institution of the foreclosure proceeding, title to the property was held by Tri-State Improvement Co. Tri-State Improvement Co. conveyed the property to West Penn System Construction Co. by Deed dated May 25, 1932. At the time of the entry of the Decree of Sale, and the execution of the Special Master's Deed, the property was owned by West Penn Securities Department, Inc., title thereto having been acquired from West Penn System Construction Co. by Deed dated January 5, 1933. West Penn Securities Department, Inc. conveyed the property to Center Foundry and Machine Co. and Clara Narrigan by Deeds dated October 7, 1941 and October 24, 1941, respectively. All of the above-named respondents, namely, Tri-State Improvement Co., West Penn System Construction Co., West Penn Securities Department, Inc., Centre Foundry and Machine Co., and Clara Narrigan are residents of the State of West Virginia, the State of the petitioner's residence. None of the said respondents was a party to the foreclosure proceeding.

Decisions of the Courts Below

On the basis of the foregoing facts, both the District Court and the Circuit Court of Appeals held that the petitioner's bill was an original bill, and not supplemental to the foreclosure proceeding, inasmuch as it involved parties, issues and property not before the Court in the foreclosure proceeding, and that the absence of diversity of citizenship, therefore, was fatal to the jurisdiction of the Court.

Argument

In attempting to lay a foundation for its petition for a writ of certiorari, the petitioner, under the heading "Reasons for Granting the Writ" (P. 11-13), alleges that the decision in this case is in conflict with the decisions of several cases decided by this Court, and the decisions of two other Circuit Courts of Appeals. While perhaps it is not the policy of this Court to grant a writ of certiorari because of the failure of a Circuit Court of Appeals to follow the precedents of this Court, the respondents feel called upon to demonstrate, under the discussion, as hereinafter set out, of the cases cited by the petitioner,

that not one of those cases is applicable to the facts of the instant case. A consideration of the cases cited in the petitioner's brief will disclose that the petitioner failed completely to show that the decision of the Circuit Court of Appeals in this case has in any way departed from the legal principles enunciated in the cases upon which the petitioner relies. A reading of the petition, under the headings "Questions Presented" (P. 2) and "Specifications of Errors to be Urged" (P. 10), will reveal that the petitioner feels aggrieved, not because the Circuit Court of Appeals for the Fourth Circuit has departed from the well-established principles of law involved in the cause, but rather because the petitioner feels that the Court erred in applying those well-established principles of law to the fact presented.

An examination of the opinion rendered by the Circuit Court of Appeals in this matter, the respondents believe, will fully support the foregoing conclusions. In the opinion, after reciting the facts, the Court proceeds to a thorough discussion of the theory and philosophy of ancillary jurisdiction. No fault was found with the cases cited by the petitioner in its brief before the Circuit Court of Appeals, except that the Court observed that the principles established by those cases were not germane to the issues of the instant case. As a matter of fact, the Court found no conflict between the cases cited by the appellant (the petitioner herein) and the cases cited by the appellees (the respondents herein). The Court simply stated "We are not impressed by the cases cited in the brief of appellant," and, having cited with approval a number of cases relied upon by the appellees (the respondents herein), the Court continued "on the other hand, the case of *New Orleans Land Co. v. Leader Realty Co.*, 255 U. S. 266, 41 S. Ct. 259, 65 L. Ed. 621, on which appellees heavily rely, seems to us quite in point."

In confirmation of the respondents' contention that the petitioner has not laid a proper basis for the issuance of a writ of certiorari, it is submitted that an examination of the Syllabi of the opinion of the Circuit Court of Appeals in this case (132 Fed. 2d. 720) will disclose that not one principle of law is propounded therein which in any way conflicts with any of the cases relied upon by the petitioner, or with any other decision of this Court or another Circuit Court of Appeals.

It is submitted that the principles of law involved and applied in this case have been established, and universally accepted and approved, for many years. The decision of any case of this character involves only the application of well-accepted principles of law to the facts presented. An alleged misapplication of such well-established principles of law, the respondents believe, does not constitute a proper basis for a writ of certiorari under the rules of this Court.

THE DECISION COMPLAINED OF IN THIS PROCEEDING DOES NOT IN ANY WAY CONFLICT WITH THE DECISIONS OF THIS COURT, AND OTHER CIRCUIT COURTS OF APPEALS, UPON WHICH THE PETITIONER RELIES IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI.

The petitioner relies heavily upon the case of *Independent Coal & Coke Co. v. U. S.* (1927), 274 U. S. 640, 71 L. Ed. 1270. No parallel can be drawn between the facts in the *Independent Coal & Coke Company* case and the facts involved in the case under consideration. Likewise, no parallel can be drawn between the principles of law involved and applied in the two proceedings. In the bill that was filed in the *Independent Coal & Coke Company* case, which did not involve a foreclosure proceeding, the United States merely asked for a reaffirmance of its rights in certain real estate which had already been determined in a prior proceeding. The two proceedings involved exactly the same property, and, with one exception, exactly the same parties. While the second suit was described by the Court as being "in the nature of a supplemental bill in aid of the former decree," in reality it was a new and independent proceeding. It was supplemental only in the sense that it was brought for the purpose of confirming the decree that had been entered in the first suit, and of enforcing property rights previously adjudicated in the prior proceeding. No question of jurisdiction was involved. The United States was the plaintiff in the suit. The objection to the naming of a new party defendant was not jurisdictional. The objection was based on a contention that the bill contained no allegations charging either that the new party was a party to the fraud by means of which the other defendants obtained title to the property, subsequent to the

entry of the decree in the first suit, or that the new party acquired any interest in the property from or under any other party to the transaction.

The case of *Freeman v. Howe* (1861), 24 Howard 450, 16 L. Ed. 749, holds merely that where property is in the custody of a United States Marshal, under process of attachment issued by a federal court, the right to hold the property is a question which the federal court has exclusive jurisdiction to determine. A state court is without power to interfere with the custody and control of the property and to determine conflicting claims to the right to possession of the property. By way of dictum, the court did point out that the claimant who sought to invoke the aid of the state court was mistaken in the belief that he was without remedy in the federal court. On this point, the Court merely said that a bill may be filed on the equity side of a federal court, to restrain or regulate judgments or suits at law in the same court, as ancillary to the original proceeding and without reference to the residence of the parties.

In the case of *Pacific Railroad of Missouri v. Missouri Pacific Railway Co., et al.* (1884), 111 U. S. 505, 28 L. Ed. 498, it was held merely that a federal court has jurisdiction to entertain an ancillary or supplemental bill charging fraud in a prior foreclosure proceeding, where the property involved and the interested parties are the same in both proceedings. This principle was expressly approved, in the instant suit, by the Circuit Court of Appeals for the Fourth Circuit.

The decision in the case of *Central Union Trust Co. v. Anderson County, Texas* (1925), 268 U. S. 93, 60 L. Ed. 862, is merely a pronouncement of the principle that a federal court, in a foreclosure proceeding, has jurisdiction, in an ancillary or supplemental suit, to determine a controversy involving property which is in the custody of the court. This principle likewise was expressly recognized by the Circuit Court of Appeals in the instant case.

In the case of *Ferguson, et al. v. Omaha & S. W. Co.* (1915), 227 Fed. 513, the Circuit Court of Appeals for the Eighth Circuit held merely that a purchaser of property at a foreclosure sale may, by ancillary or supplemental bill, assert rights against one who purchased interests in the property pending the fore-

closure proceeding and while the property was before the court.

The cases of *Wade v. Chicago, Springfield & St. Louis R. Co.* (1892) 149 U. S. 327, 37 L. Ed. 755, *Guaranty Trust Co. of New York v. Atlantic Coast Electric R. Co.* (1905), C.C.A. Third Circuit, 138 Fed. 517, and *McGourkey v. Toledo & O. C. R. Co.* (1892), 146 U. S. 536, 36 L. Ed. 1079, represent findings that, under certain circumstances, the lien of a mortgage may attach, under an after-acquired property clause, to equitable interests in property. This question, not having been presented for determination, was not passed upon by either the Circuit Court of Appeals for the Fourth Circuit or the District Court in considering the jurisdictional question. The *Wade* case did not involve a foreclosure proceeding. While the *Guaranty Trust Co.* case and the *McGourkey* case did involve foreclosure proceedings, no question was presented in either of these cases with respect to the power and jurisdiction of a federal court, under a bill which is claimed to be ancillary or supplemental to a foreclosure proceeding, to determine the rights of persons, who were not parties to the foreclosure proceeding, to property which was not before the court in the foreclosure proceeding.

The cases of *Alexander v. Hillman* (1935), 296 U. S. 222, 80 L. Ed. 192, and *Brun v. Mann* (1906 C.C.A. Eighth Circuit), 151 Fed. 145, likewise bear no factual similarity to the case under consideration and represent the application of legal principles which have not been invoked or applied in this proceeding. In the *Hillman* case, it was held merely that when a claimant appears before a master in a federal receivership proceeding, and proves a claim, he submits to the jurisdiction of the receivership court for the adjudication of his liability to the res; and a counter-claim may be asserted against such claimant, by the receiver, if the counterclaim is cognizable in equity and its adjudication is essential to a final disposition of the receivership proceeding. The decision in the *Brun* case is merely to the effect that a federal court has jurisdiction to enforce the execution of a judgment of revivor, entered upon a judgment rendered by the court itself, against the very person against whom the judgment of revivor has been entered.

There is no conflict between the decisions in the foregoing cases and the decision in the instant case. In the first place,

the foregoing cases propound principles of law which either are not applicable to the instant case or were expressly recognized by the Circuit Court of Appeals. The difference between the instant case and the foregoing cases lies in the fact that not one of the latter involved the question, squarely presented in the instant case, of the jurisdiction of a Federal court, in a proceeding which purports to be ancillary or supplemental to a foreclosure suit, to determine, as among residents of the same state, conflicting claims, of persons not parties to the foreclosure proceeding, to property which was not before the court in the foreclosure proceeding. The Circuit Court of Appeals, in the instant case, at no time took issue with any principle or rule propounded in the cases cited by the petitioner. As already pointed out, some of those cases bear no relationship whatsoever to the case under consideration. Others pronounce rules which the Circuit Court of Appeals expressly recognized but held were not applicable to the facts in this case.

The legal principles involved in this proceeding are well settled. The problem presented to the Circuit Court of Appeals for the Fourth Circuit was not one of determining what the law was. On the contrary, the problem merely resolved itself into a matter of applying well-recognized legal principles to the facts involved.

The court did not hold, as is contended by the petitioner, that a federal court is without jurisdiction, in an ancillary or supplemental proceeding, to cure fraud in a prior suit, or further to deal with property which was before the court in a prior suit. The court expressly recognized and acknowledged such jurisdiction, pointing out the very broad powers enjoyed by federal courts in such matters, but found that such jurisdiction did not extend to a situation, such as is presented in this case, where the second suit "brings in new parties who are necessary," involves real estate which was not before the court in the prior action, and raise issues that "are altogether new" (R. 71-72).

The decision of the Circuit Court of Appeals of this Fourth Circuit is not in conflict with any decision of this Court or the decision of any other Circuit Court of Appeals, either in the determination of legal rules or principles, or in the application thereof to the facts presented. Furthermore, the decision, which

the petitioner is now seeking to have reviewed by writ of certiorari, is in strict conformity with a long line of decisions handed down by this Court and the various Circuit Courts of Appeals. *Christmas v. Gaines* (Russell) (1871) 14 Wall. 69, 20 L. Ed. 762. *Dunn v. Clarke* (1934), 8 Peters 1, 8 L. E. 845. *New Orleans Land Co. v. Leader Realty Co.* (1921), 255 U. S. 263, 65 L. Ed. 621. *Pittsburgh C. C. & St. L. Ry. Co. v. The Long Island Loan & Trust Co.* (1898), 172 U. S. 493, 43 L. Ed. 528. *Smith v. Chase National Bank* (1936 C.C.A. Fourth Circuit), 84 Fed. 2d 608, 616. *International—Great Northern R. Co. v. Binford* (1926 C.C.A. Fifth Circuit), 10 Fed. 2d. 496, certiorari denied 273 U. S. 694, 71 L. Ed. 844.

Conclusion

In view of the foregoing, it is respectfully submitted that the petitioner is not entitled to the issuance of a writ of certiorari.

Respectfully submitted,

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